

and wherein the side walls of the closure assembly are spaced apart a distance generally corresponding to the spacing between the side walls of the cold pan.

Claim 29. ¹⁷ A merchandiser according to claim 17 ² having a front and a back; and wherein the cold compartment is accessible from both the front and the back of the merchandiser.

Claim 30. ¹⁸ The combination according to claim 18 ^{2+ma} wherein the merchandiser has a front and a back; and wherein the cold compartment is accessible from both the front and the back of the merchandiser.

REMARKS

Summarizing this amendment, claims 1, 3, 5, 7, 10, 11, 16, 17, 18, 22 and 23 have been amended; claims 6, 8, 9, 13, 14, 17, 19 and 20 remain unchanged; claims 2, ^{4 ma} 3, 12, 15 and 21 have been cancelled, and claims 24 – 30 have been added. Thus, claims 1, 3, 5 – 11, 13, 14, 16 – 20 and 22 – 30 are presented for the examiner's consideration.

New independent claim 24 represents former dependent claim 15 in independent condition and as such includes all of the limitations of original claims 11, 13, 14 and 15. Claim 16 now depends from claim 24. These claims are believed to be allowable in view of the last paragraph on page 8 of the Office action.

New independent claim 25 represents former dependent claim 21 in independent condition and as such includes of the limitations of original claims 18, 19, 20 and 21. Claim 22 now depends from claim 25. These claims are also believed allowable in view of the last paragraph on page 8 of the Office action.

Applicant resubmits independent claim 11 with amendments and requests that the examiner reconsider it. This claim calls for a cold pan having vertical walls that surround

a cold compartment and a bottom wall extended across the bottom of the compartment. It also calls for a closure assembly located above the cold pan and including side walls that rise upwardly from the cold pan, a shelf supported on the side walls above and spaced from the cold pan, a housing supported on the side walls above the shelf, a back wall, and a front wall, all of which combine to enclose a warm compartment. According to the claim, at least one of the front and back walls is movable to provide access to the warm compartment. In addition, the claim calls for a heating unit in the housing, including a fan and a heating element, and also a refrigerator unit having a conduit along walls of the cold pan. The construction set forth in claim 1 is not anticipated by any of the cited reference nor is it rendered obvious by them.

The examiner rejected claim 11 and claim 12, which depended from it, both as originally presented, contending that they described an invention that was obvious in view of the Pullens patent considered along with the Jarman patent. Neither of these patents discloses or even suggests a merchandiser with a warm compartment above a cold compartment. Nor does either suggest a warm compartment supported on side walls extending upwardly from a cold pan and supporting the components that enclose a warm compartment. Likewise, neither discloses a housing with a heating element and a fan in it for circulating warm air through the warm compartment. Claim 11 requires all of the foregoing.

The Pullens patent shows a battery-operated hot-cold storage unit, but it cannot be characterized as a merchandiser. because it is normally closed with its contents hidden from view. Only, when one opens the door 34 can one observe the contents, but when that occurs, the cold and warm air normally trapped in the unit escape. Moreover, the

A

Pullens unit has a cool compartment located above its hot compartment. In this regard, note the cooling coil elements 62 and the heating coil 76, the former being above the latter. One of ordinary skill in the art certainly would not derive applicants' merchandiser as set forth in claim 11 from a consideration of the Pullens patent. That patent may suggest a cabinet with a front-opening door that isolates the entire interior, but that does not resemble a hot-cold merchandiser with a warm compartment above a cold compartment as the claim requires. At best, the Pullens patent suggests warm and cold compartments, with the former below the latter, in a sealed cabinet, but applicants' invention as set forth in claim 11 possesses a lot more.

The Jarman patent, even if added to the Pullens patent, does not suggest applicants' merchandiser as set forth in claim 11. All it shows is a cold pan. The side walls of the closure assembly called for in the claim are not present, nor is the housing. Moreover, the warm-over-cold arrangement nowhere appears. Indeed, it is difficult to imagine how one of ordinary skill in the art would combine the Pullens and Jarman patents to produce anything, much less applicants' invention as set forth in claim 11. The cold pan concept of Jarman does not lend itself to the sealed cabinet concept of Pullens. In fact, they are conflicting concepts, one being for commercial use and the other for household use.

Accordingly, claim 11 is believed to be allowable. The same holds true for claim 13, 14, 17 and 27 – 29 which depend from claim 11. Apart from that, claim 27 calls for transparent panels located in the side walls and lamps located along the surfaces of the side walls that are presented away from the warm compartment and the cold compartment for illuminating the two compartments. This prevents the bulbs from

A

experiencing the temperature extremes of the two compartments – or in other words maintains them at more uniform temperatures – which is better for the bulbs. This concept is not disclosed in the cited patents. Nor is a merchandiser that has its cold compartment accessible from the front and back of the merchandiser as required by claim 29.

Independent claim 18 calls for a counter having a countertop and further requires a merchandiser supported on the countertop. The claim describes the merchandiser much the same as does independent claim 11 and further specifies that the cold pan of the merchandiser is located within the counter and opens upwardly out of the opening in the countertop, that is to say, the cold pan is recessed into the countertop.

The examiner rejected claim 18 as previously presented, contending that the structure described in it was obvious in view of the Pullens and Geisen patents. The Pullens patent has already been considered. Suffice it to say, the Pullens patent does not show a merchandiser, much less one with a warm compartment supported on side walls above a cold pan. Indeed, it shows a household food compartment. The Geisen patent shows a countertop refrigerator that displays some type of merchandise. The refrigerator sits on top of a counter, and has no capacity to hold anything warm. Moreover, it has no cold pan that is recessed into a countertop as the claim requires. Like the unit of the Pullens patent, it has a front-opening door that, when closed, completely isolates the interior of the unit. Even if one combined the Geisen patent with the Pullens patent, no teachings are present that would inspire one to put a completely enclosed warm enclosure above a recessed cold pan, much less provide the supporting side walls and the overhead housing, all as required by claim 18.

A

Accordingly, claim 18 is believed to be allowable over the Pullens and Geisen patents as are claims 19, 20, 22, 23 and 30 which depend from claim 18.

Independent claim 1 as amended, although broader than independent claims 11 and 18 in some respects, is still confined to a merchandiser having a warm compartment located above a cold compartment with the cold compartment being accessible from beneath the warm compartment. Indeed, the claim specifies that the cold compartment is accessible from both the front and the back of the merchandiser. It further requires that at least one of the walls enclosing the warm compartment is transparent.

The examiner rejected claim 1 as originally presented, asserting that it described nothing more than that which is disclosed in the Pullens patent. However, the Pullens patent does not disclose a warm compartment over a cold compartment, nor does it disclose a cold compartment that is accessible from both front and back or a transparent wall on the warm compartment. Thus claim 1 as amended is not anticipated by the Pullens patent, nor is it rendered obvious by the Pullens patent.

To be sure, the Behr patent shows a cold compartment enclosed within a hood having hinged or sliding doors both at its front and at its rear, but the Behr patent does not suggest a warm compartment. One of ordinary skill upon being confronted with both the Pullens and Behr patents, would certainly not derive applicants' merchandiser as set forth in claim from them. In the first place, the units of the two patents are too dissimilar in appearance and construction to form a logical combination. One discloses a box-like unit that is totally unsuited for displaying food; the other a refrigerated display. Neither patent discloses how the heated compartment of Pullens could be incorporated into the

A

refrigerated display of Behr, if indeed the two patents even suggest the concept of combining the two.

Thus, claim 1 as amended is believed to be allowable as are claims 2, 3, 5 – 10 which depend from claim 1.

In the Office action to which this amendment responds, the examiner rejected most of the claims under 35 USC 103, contending that various combinations of patents rendered applicants' merchandiser as set forth in those rejected claims is obvious. The Pullens patent stands foremost among the patents relied upon by the examiner. Other patents with which the examiner combined the Pullens patent, include the patents to Behr, Jarman and Geisen. In considering the claims as amended the examiner must not lose sight of the basic requirements for obviousness. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify a reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art references must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. MPEP 2143.

Here applicants' disclosure provides the only suggestion for combining the Pullens patent, with its warm and cold compartments, with any of the other patents to produce the merchandiser set forth in the claims. Moreover, even when Pullens is combined, the combination does not meet all of the claim limitations as previously discussed.

A

On October 19, 2000, applicant filed with the Patent Office application Serial No 29/120,090 for a design patent on the merchandiser that forms the subject of the present application. That application is submitted herewith along with its Notice of Allowance dated December 20, 2000. The Patent Office also issued a notice of allowability in the design application and in connection with that action cited the patents appearing on Form 1449 submitted herewith. The patents themselves are likewise submitted herewith.

The undersigned certifies that no item of information contained in Form 1449 submitted herewith was cited in a communication from a foreign patent office in a counterpart foreign application or, to the knowledge of the undersigned, after making reasonable inquiry, was known to any individual designated in 37 CFR 1.56(c) more than three months prior to the filing of Form 1449.

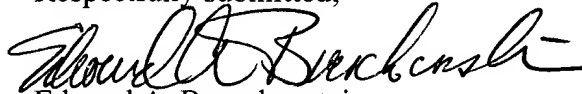
Applicants, pursuant to 37 CFR 1.136, petition the Patent Office to extend the period for responding to the Patent Office action of September 28, 2000, which period would have expired December 28, 2000, for an additional month until January 28, 2001.

A check in the sum of \$153.00 is submitted herewith to cover the fee prescribed by 37 CFR 1.16(b)(c) for two addition independent claims (\$80) and two claims in excess of the number of claims in the application as filed (\$18) and to cover the fee prescribed by 37 CFR 1.17(a) for the one month extension of time (\$55).

A

In view of the foregoing, favorable consideration and allowance of the application with 25 claims – namely, claims 1, 3, 5 - 11, 13,14, 16 - 20, and 22 – 30, are respectfully requested.

Respectfully submitted,



Edward A. Boeschenstein

POLSTER, LIEDER, WOODRUFF & LUCCHESI, L.C.

763 South New Ballas Road

St. Louis, Missouri 63141

(314) 872-8118

Reg. No. 22,986

A